APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12190

JOSEPH DOTO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Decided March 24, 1955

Mr. William H. Collins for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Mr. Leo A. Rover,* United States Attorney, and *Messrs. Lewis Carroll* and *William Hitz,* Assistant United States Attorneys, were on the brief, for appellee.

Before WILBUR K. MILLER, PRETTYMAN and FAHY, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Appellant was indicted, tried and convicted on one of two counts charging him with perjury [1] while testifying before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce. The alleged perjurious statement was that he was then a citizen of the United States. The Government says he was and is a citizen of Italy, having been born there and never naturalized in the United States.

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[1] 31 STAT. 1329 (1901), D. C. CODE § 22-2501 (1951).

Doto says the question as to his citizenship was not material to the inquiry which the Committee was authorized to make. We think it was. The Committee was authorized by the Resolution creating it[2] "to make a full and complete study and investigation of whether organized crime utilizes the facilities of interstate commerce * * * and, if so, * * * the identity of the persons * * * by which such utilization is being made, * * * and whether or not organized crime * * * operates * * * for the development of corrupting influences in violation of law of the United States * * *." We think the question whether organized crime, if it exists, is operated by citizens or by aliens is on its face a material phase of the investigation thus authorized. The identity, as citizens or as aliens, of persons engaged in organized crime is on its face material to a legislative inquiry into the subject, the essential objective of which is to determine whether legislation is needed and, if so, what sort of legislation.

Doto says the evidence was insufficient to meet the standard required in perjury cases. That test was described in *Maragon* v. *United States*.[3] The rule is that perjury cannot be proved by the uncorroborated testimony of one witness. The rule has been paraphrased to be that perjury must be proved by two witnesses or by one witness with corroboration, and that paraphrasing has been urged as meaning that at least one live witness must be put on the witness stand. But, as we indicated in *Maragon*, that interpretation is not accurate. The

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[2] S. RES. 202, 81st Cong., 2d Sess. (1950).

[3] 87 U.S. App. D.C. 349, 187 F.2d 79 (D.C.Cir. 1950), *cert. denied*, 341 U.S. 932, 95 L.Ed. 1361, 71 S.Ct. 804 (1951). And see Young v. United States, 94 U.S. App. D.C. —, 212 F.2d 226 (D.C.Cir. 1954), *cert. denied*, 347 U.S. 1015, 98 L.Ed. 1137, 74 S.Ct. 870 (1954).

rationale of the rule is that the falsity of one person's oath cannot be established by another person's oath without more. Documentary evidence, and even so-called circumstantial evidence under some conditions, may be certain beyond doubt.[4]

In the case at bar the Government presented testimony and a series of evidentiary documents. We will not attempt in this opinion to describe the items elaborately. It is sufficient to enumerate some of them. They were: (1) A birth register, showing the birth of one Guiseppantonio Doto in Montemarano, Italy, in 1902 of parents whose names were those of appellants' parents. Guiseppe is the Italian equivalent of the English Joseph. A similar register showed the births to the same parents of two boys with the same names as appellant's brothers. (2) Ship manifests showing the voyages to this country of persons with the names of appellant's parents, the mother being accompanied by four sons, one named Joseph and the others with the proven names and ages of appellant's brothers. (3) New York State census records of the family. (4) The testimony of appellant's older brother, who, without directly saying so, clearly identified appellant as the younger brother who came over from Italy with his mother. (5) Official certificates showing that neither appellant's father nor his mother was ever naturalized, and a stipulation to that effect as to appellant. The question before the trial judge at the conclusion of the presentation of the proof was whether the cumulated evidence met the stringent requirements of the law as to proof of perjury. The trial judge thought it did, and we agree with him. The evidence we have outlined was not merely the oath of one person. It consisted mostly of documents which, if be-

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[4] United States v. Wood, 14 Pet. (39 U.S.) 430, 10 L.Ed. 527 (1840); Hammer v. United States, 271 U.S. 620, 627, 70 L.Ed. 1118, 46 S.Ct. 603 (1926).

lieved, made the conclusion inescapable, at least as certain as corroborated direct testimony upon this subject matter, *i.e.*, citizenship, would have been.

We have examined the other points urged vigorously and skillfully by counsel for appellant, but we find no error affecting adversely substantial rights of the accused. Specifically as to the more impressive of such points, we think:

1. The prosecutor did not attempt to cross-examine his own witness when he put a series of questions phrased "You don't remember [such-and-such]?". But, even if such questions were in the nature of cross-examination, the prosecutor claimed the witness was hostile, and the trial judge sustained his position. Appellant's counsel urges that Section 104, Title 14, of the District of Columbia Code [5] applies but was not followed. That section applies only when a party producing a witness is taken by surprise and desires to prove prior inconsistent statements. But this was not a case of being taken by surprise—the prosecutor specifically denied surprise; it was a case of a hostile witness.

2. The prosecutor asked no "pedigree" questions [6] of the witness Antonio Doto and so did not open that line of inquiry to cross examination. The matter of pedigree testimony, an exception to the hearsay rule, is a technical matter, and the prosecutor seems to have been meticuous in avoiding it.

3. The census records were admissible. They were records taken pursuant to a provision in the New York State Constitution,[7] which required, for election district

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[5] 32 STAT. 540 (1902).

[6] WIGMORE, EVIDENCE §§ 1480-1503 (3d ed. 1940).

[7] Art. III, § 4.

purposes, an enumeration of inhabitants "excluding aliens". The trial court admitted them only to show name, residence, and status as aliens.[8] Such an official enumeration becomes virtually a register.

4. The police records are a different and more difficult problem. They consisted of a number of entries, at widely separated dates, on police precinct blotters, showing the arrest on various charges of a person with appellant's name and address and containing some biographical data. A witness said the practice was to obtain this data from the arrested person, and the trial court admitted the material upon that theory. Five of the six entries showed the "Nativity" of appellant as "Italy"; one entry showed "Nativity United States". It is urged that these entries were not properly admissible without testimony that each answer as to "Nativity" was furnished by appellant. But we think the error, if there was one, does not require reversal of the judgment. At the most the evidence was cumulative. One blotter entry was thoroughly established by a police officer as a witness of the event.

The judgment of the District Court will be

Affirmed.

[8] 5 WIGMORE, EVIDENCE § 1671 (3d ed. 1940).

81st CONGRESS S. RES. 202
2D Session

RESOLUTION

Resolved, That a special committee composed of five members, two of whom shall be members of the minority party, to be appointed by the President of the Senate from the Committee on Interstate and Foreign Commerce of the Senate and the Committee on the Judiciary of the Senate, is authorized and directed to make a full and complete study and investigation of whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law of the United States or of the State in which the transactions occur, and, if so, the manner and extent to which, and the identity of the persons, firms, or corporations by which such utilization is being made, what facilities are being used, and whether or not organized crime utilizes such interstate facilities or otherwise operates in interstate commerce for the development of corrupting influences in violation of law of the United States or of the laws of any State: *Provided, however,* That nothing contained herein shall (1) authorize the recommendation of any change in the laws of the several States relative to gambling, (2) effect any change in the laws of any State relative to gambling, or (3) effect any possible interference with the rights of the several States to prohibit, legalize, or in any way regulate gambling within their borders. For the purposes of this resolution, the term "State" includes the District of Columbia or any Territory or possession of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 140

JOSEPH DOTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1 R. 188) [1] has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (R. 194) was entered on March 24, 1955, and a petition for rehearing was denied on May 11, 1955 (R. 193).

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[1] The Joint Appendix is designated "R."; the typed transcript from the trial court is designated "T.".

The petition for a writ of certiorari was filed on June 10, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the questioning of petitioner with respect to his citizenship was material to a Senate investigation of organized crime in interstate commerce, where the Senate Resolution authorized study of the identity of the persons involved.

2. Whether the evidence was sufficient to sustain the conviction for perjury.

3. Whether there was error in the admission of census records and police records of petitioner's nativity.

4. Whether comment on the evidence by the prosecutor constituted error.

5. Whether petitioner was erroneously refused permission to cross-examine a prosecution witness regarding petitioner's family history.

RESOLUTION INVOLVED

Senate Resolution 202, 81st Congress, 2nd Session, provided in pertinent part:

> *Resolved*, That a special committee composed of five members, two of whom shall be members of the minority party, to be appointed by the President of the Senate from the Committee on Interstate and Foreign Commerce of the Senate and the Committee on the Judiciary of the Senate, is authorized and directed to make a full and complete study and investiga-

tion of whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law of the United States or of the State in which the transactions occur, and, if so, the manner and extent to which, and the identity of the persons, firms, or corporations by which such utilization is being made, what facilities are being used, and whether or not organized crime utilizes such interstate facilities or otherwise operates in interstate commerce for the development of corrupting influences in violation of law of the United States or of the laws of any State: * * *.

STATEMENT

Petitioner was subpoenaed (R. 20, 22) before the Senate Committee authorized to investigate the use of interstate commerce facilities by organized crime. Sen. Res. 202, 81st Cong., 2nd Session. When asked "* * * were you born in this country?" he replied, "Passaic, New Jersey" (R. 23). Petitioner was also asked "well, you are a citizen of the United States"; he replied, "That is right." These answers were the foundation of a two-count indictment for perjury (R. 2, 3; T. 553) in the United States District Court for the District of Columbia. The trial court granted a motion for acquittal on Count One (the "Passaic, New Jersey" answer) and submitted the second count to the jury. (R. 5, T. 575.) On their guilty verdict (T. 555), peti-

tioner was sentenced to serve from eight to twenty-four months (R. 7, 8; T. 580). The Court of Appeals unanimously affirmed (Pet. App. 1-5).

The evidence may be summarized as follows:

The government called Anthony Doto who identified petitioner as his brother (R. 94). Anthony gave his parents' names, and their birth place in Italy, his own date of birth and the ages and names of his three brothers including petitioner (R. 94-95, 96). He said he came here from Italy in 1908 or 1909, having been born in Montemarano (R. 94, 97). The government introduced ships' manifests of two vessels arriving in the United States in 1904 and 1906 which showed arrivals of an individual bearing the name of petitioner's and the witness' father, who came from Montemarano, Italy, and who was listed as going to join his uncle, at 498 President Street, Brooklyn (R. 97, 98; Government's Exhibit 7). A certificate of the Chief of the Records Administration Branch of the Central Office of the Immigration and Naturalization Service stated that a diligent search had revealed that these were the only records of arrival in New York of any person by the name of petitioner's father, Michael Doto, or by the alias of Adone or Adonis (R. 99, 100). There was also introduced the manifest of the S. S. *Montserrat* which arrived in New York in 1909 (R. 100) carrying a woman by the name of petitioner's mother (R. 100) coming from Montemarano, Italy (R. 106), with four children bearing the names of Anthony's brothers then living, including

petitioner's name (R. 100, 104). These children were listed as born in Italy (R. 106) and were the approximate ages of the brothers, including petitioner (R. 101, 104).

A certificate from the Records Administration Branch of the Immigration and Naturalization Service was introduced to show that neither of petitioner's parents had ever been naturalized, either under their original name, Doto, or under their assumed name Adone or Adonis (R. 106, 107, Gov't. Exhibits 10, 11). It was stipulated that petitioner had never applied for naturalization (R. 106). Naturalization papers of the witness Anthony were produced; these contained a "certificate of arrival number" which was identical with that listed beside his name on the *Montserrat* manifest (R. 114).

Anthony testified that 498 President Street was the earliest address he recalled in the United States (R. 108). Census records for 1915 compiled by New York State for voting purposes (T. 359, 364, 365) were offered in evidence. These showed the Doto family, with names and ages corresponding with the ship manifest and with Anthony's testimony, living at that time at 498 President Street, and using the name Adone. This record listed the nativity of all members as Italy (R. 187, Gov't. Ex. 12), with the exception of a daughter born here after the family's immigration (R. 187).

Anthony testified that the family, including his parents and brothers and Anthony's wife and son, lived at 284 Third Avenue, New York, about 1925

(R. 110, 111). Census records of New York compiled for voting purposes (T. 359, 364, 365) showed the family as enumerated by him living there at that time, and listed petitioner as alien-born (R. 187; Gov't. Ex. 13).

The Government also introduced a properly authenticated Italian birth certificate showing petitioner's birth at Montemarano (Gov't. Ex. 5). Five other similar birth certificates showed the same birth place for his parents and three brothers (Gov't. Ex. 2, 3, 4, 5, 6).

Petitioner's knowledge of his nativity was shown by a police officer's testimony that he had arrested petitioner in 1922, that he had been present when petitioner was "booked" and had heard petitioner state that he was born in Italy (R. 124, 125; Gov't. Ex. 16A). A police captain testified that it was the practice for the desk officer, a police lieutenant or a sergeant in the lieutenant's absence, to interrogate the prisoner and fill in the form's question as to nativity in accordance with the prisoner's reply (R. 132, 133). Four other arrest records were introduced in which petitioner's nativity was listed as Italy. (R. 183, 177, 169, 175; Gov't. Exhibits 17, 18, 19, 21.) A sixth booking listed his birth as "United States" (R. 176; Gov't Ex. 20).

On cross-examination, petitioner's counsel asked Anthony whether he had ever heard "a discussion by your family with reference to Joseph and where he was born?" (R. 119). Petitioner contended that the "pedigree" of the family had been com-

pletely opened up by the prosecution on direct examination (R. 121). The court sustained the government's objection that the question was beyond the scope of the direct examination (R. 120).

In his closing argument, the prosecutor stated in substance that petitioner had failed to call his brother Anthony to the stand to state petitioner's birthplace, because he knew that Anthony could not say that petitioner was born in this country (T. 478-480). Petitioner's counsel objected on the ground that this was a comment on petitioner's failure to offer testimony (T. 479).

ARGUMENT

1. The Senate Resolution directed the Committee to investigate "whether organized crime utilizes the facilities of interstate commerce * * * and, if so, * * * the identity of the persons, firms, or corporations by which such utilization is being made * * *". Petitioner's contention (Pet. 7-14) that the question of his citizenship was immaterial disregards the fact that an individual's citizenship is a vital part of his identity. Abundant evidence was offered of the Committee's interest in the part that resident alien criminals were playing in criminal organizations (R. 35-55, 63-67, 72-93). An interim report of the Committee noted that only the federal government could "take affirmative action to rid our shores of alien criminals who have become members of predatory criminal groups" (R. 63).

There is no substance in petitioner's corollary argument (Pet. 14-15) that the acquittal granted

him on Count One, based on his reply that he was born in Passaic, New Jersey, entitled him to an acquittal on Count Two, based on his reply that he was a citizen of the United States. The short answer is that the question on which his conviction was based is certainly material, and if the trial court excluded the Count One question through an erroneous belief that it was immaterial, petitioner may not complain of an error in his favor. Moreover, the materiality of the two questions is not equal. A question as to citizenship is directly related to alienage—a subject of proper concern to the Committee—but a query as to place of birth is further removed from immediate relevance, since both citizens and non-citizens may be born abroad. Also, if petitioner had been born somewhere in the United States rather than abroad, a false answer as to the city would not have been material to the inquiry to the same extent as his citizenship would be.[2]

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[2] By analogy to cases holding that refusal to answer a number of questions dealing with the same subject matter constitutes one contempt, petitioner argues (Pet. 17-20) that his acquittal on the first count barred his conviction on the second because both together charged only one perjury. However, the rationale of the contempt decisions is that the contumacious refusal, which is the gist of the offense, is basically one act. In perjury, where the gist of the offense is knowing falsity, the same rationale would not apply. Since each statement can be, and for conviction must be shown to be, knowingly false, it seems clear that each separate answer is a separate offense. Cf. *Seymour* v. *United States*, 77 F. 2d 577 (C.A. 8).

Moreover, if the two counts did charge only one offense, the trial court should properly have submitted only one to the jury. While, in that event, one count would have been dismissed rather then having a judgment of acquittal entered thereon, the fact remains that one count could and would properly have gone to the jury.

2. There is no merit in petitioner's contention that the evidence fell short of the standard required for perjury convictions. That petitioner came as a boy from Italy was conclusively established by Anthony's testimony of the family's history (including names, ages and addresses in the United States) when considered in conjunction with the ship manifests, the census records, and petitioner's and his family's birth records. It was stipulated that he never applied for naturalization, and the records showed no application by his parents. A police officer testified that he heard petitioner claim Italian birth.

Were there required, as there is not in a case such as petitioner's, a live witness plus corroborative evidence, it is submitted that Anthony's and the officer's testimony would suffice. In any event, this case comes within the exception noted by this Court in *United States* v. *Wood,* 14 Pet. 430, and in *Hammer* v. *United States,* 271 U. S. 620, 627, since the petitioner himself was in a true sense the author of documentary evidence giving the lie to his sworn testimony, when he was definitely shown to have caused his birthplace to be correctly listed on the police records. Cf. *Maragon* v. *United States,* 187 F. 2d 79 (C.A. D.C.). As this Court said in *Wood,* at p. 441, the quantitative rule does not apply to "all such [cases] where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent", or to "cases where the perjury charged is contradicted by a public record, proved to have been well known to

the defendant when he took the oath * * *". Here, the mass of evidence, documentary and oral, more than sufficed to satisfy any reasonable rule as to proof in perjury.

3. Petitioner claims that he was denied a fair trial by use of the police blotters and census records listing his birthplace as Italy. With respect to the police blotters, proof was adduced that this information was customarily obtained by interrogation of the prisoner by the desk officer. In addition, as to one of the arrests, the arresting officer testified that he heard petitioner claim Italian birth. That statement was petitioner's own and was the very type of evidence most valuable to establish *scienter* in perjury. *United States* v. *Wood, supra.* As to the others, we submit that proof of customary practice was sufficient to render them admissible as petitioner's statements, but, in any event, such evidence was merely cumulative.

It is true that census records generally may not be admissible to prove details relating to a particular person since their purpose is to report general classes of facts. But where a local census is taken for the express purpose of registering individuals, it is admissible. *Flora* v. *Anderson,* 75 Fed. 217, 231 (C.C.S.D. Ohio); cf. *Hegler* v. *Faulkner,* 153 U.S. 109; 5 Wigmore, *Evidence,* (3rd ed. 1940) Sec. 1671. Here, the census records offered were designed to obtain a record of qualification for suffrage purposes, *i.e.* for the purpose of individually separating aliens from citizens.

4. Petitioner's claim that he was unduly limited

in cross-examination of Anthony Doto with respect to "pedigree" testimony is without foundation. As the Court of Appeals noted, the government did not use any pedigree testimony. That term refers, not to proof of any fact of family history, but to hearsay declarations by members of the family. 5 Wigmore, *Evidence,* Secs. 1481, 1502, 1480-1503. Anthony Doto had not testified to hearsay, but to facts in his own knowledge.

Since there was no pedigree evidence within the scope of the direct examination, the trial court properly ruled against petitioner's cross-examination (R. 120). However, the court offered petitioner opportunity to bring out any pedigree evidence he wished by making Anthony his own witness, but petitioner refused to do so (R. 120, 121).

5. Petitioner's objection to the prosecutor's comment on his failure to offer testimony is misconceived. The government did not refer to petitioner's failure to take the stand. Comment on the failure to offer proof by Anthony of petitioner's birth in the United States, or petitioner's belief in such birth, was legitimate since the rule is that where a defendant has it peculiarly within his power to produce elucidating testimony his failure to do so creates an inference unfavorable to him, and comment thereon is justified. *Graves* v. *United States,* 150 U.S. 118; *United States* v. *Beekman,* 155 F. 2d 580 (C.A. 2); *Milton* v. *United States,* 110 F. 2d 556 (C.A. D.C.).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

JULY 1955.

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